

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

MONDAY, THE 12TH MARCH 2007 / 21ST PHALGUNA 1928

CRL.A.No. 1921 of 2006()

SC.280/2005 of ADDL. SESSIONS COURT (ADHOC)-II, KALPETTA
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APPELLANT: RESPONDENT

RAGHAVAN, C.NO.3788,
CENTAL PRISON, KANNUR.

BY ADV. SRI.ARUL KUMAR.P

RESPONDENTS: PETITIONER

STATE OF KERALA,
C.I. OF EXCISE, SULTHAN BATHERY,
C.R.NO.54/03.

BY PUBLIC PROSECUTOR SRI. K.S. SIVAKUMAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 12-03-2006 THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

V. RAMKUMAR, J.

Crl. Appeal No. 1921 of 2006 A

Dated: 12-03-2007

JUDGMENT

In this appeal preferred from the Central Prison, Kannur, the appellant who was the sole accused in S.C. 280/05 on the file of the Addl. Sessions Judge (Adhoc) II, Kalpetta, challenges the conviction entered and the sentence passed against him for an offence punishable under Sec. 55 (g) of the Abkari Act.

2. The case of the prosecution is that on 31-7-2003 at about 5.30 p.m. at Vendol in Arthavayal of Sulthan Bathery, the accused was found carrying 35 litres of wash made for distilling arrack and the accused has thereby committed an offence punishable under Sec. 55(g) of the Abkari Act.

3. On the accused pleading not guilty to the charge framed against him for an offence punishable under Sec. 55(g) of the Abkari Act, the prosecution was permitted to adduce evidence in support of its case. The prosecution altogether examined 5 witnesses as P.Ws 1 to 5 and got marked 7 documents as Exts. P1 to P7 and two material objects as MO 1 and 2.

4. After the close of the prosecution evidence, the accused was questioned under Sec. 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances appearing against him in the evidence for the prosecution. He denied those circumstances and maintained his innocence.

5. Since the Court below did not consider this a fit case for recording an order of acquittal under Sec. 232 Cr.P.C. the accused was, therefore, called upon to enter on his defence and to adduce any evidence which he might have in support thereof. He did not adduce any defence evidence.

6. The learned Addl. Sessions Judge, after trial, as per judgment dated 9-08-2006 found the appellant guilty of the offence punishable under Sec. 55(g) of the Abkari Act and sentenced him to undergo simple imprisonment for 3 years and to pay a fine of Rs. 1,00,000/- and on default to pay the fine to undergo simple imprisonment for six months. It is the said judgment which is assailed in this appeal.

6. I heard Advocate Sri. Arul Kumar , the learned counsel who defended the appellant on State Brief and Advocate Sri. K. S. Sivakumar, the learned Public Prosecutor who defended the State.

7. The only point which arises for consideration is as to whether the conviction entered and the sentence passed against the appellant are sustainable or not ?

THE POINT:-

8. P.W.1 was the Excise Inspector, who accompanied the detecting officer namely, the Inspector of Excise, Sulthan Bathery. P.W.2 is the Excise Preventive Officer who accompanied the detecting officer. P.W.3 is the Assistant Excise Inspector who registered Ext.P3 crime and occurrence report and who produced the properties before court as per Ext.P4 property register and who subsequently registered Ext.P5 forwarding note. P.W.4 is the Excise Inspector who conducted the investigation and laid the charge. He prepared Ext.P6 scene mahazar. Ext.P7 certificate of chemical examination was marked through him. P.W.5 is the independent witness examined by the prosecution to prove the arrest search and seizure. Eventhough he admitted his signature in Ext.P2 seizure mahazar, he turned hostile to the prosecution.

9. Sri. Arul Kumar, the learned counsel appearing for the appellant submitted the following before me in support of his fervent plea for the acquittal of the accused:-

C.W.1 , the detecting officer has not been examined by the prosecution. No explanation has been offered for the non-examination of C.W.4. The detection was from a spot situated 20 metres away from the house of one Elsy. It was at 5.30 p.m. that the prosecution claims to have detected the offence. If so, the said Elsy would have been the best witness to speak about the detection. For reasons best known to the prosecution she has not been examined as the witness. This only strengthens the defence suggestion that it was to safe Elsy that the accused was made a scapegoat. The only independent witness examined as P.W.5 did not support the prosecution. In the face of such evidence the conviction entered and the sentence passed against the appellant cannot be sustained.

10. I am afraid that I cannot agree with the above submissions. It is true that C.W.1 who was the Excise Inspector of Sulthan Bathery Excise Range who detected the offence was not examined as a witness. It is also true that no reason has been stated as why he was given up by the prosecution. Presumably, he was not available for trial on issue of summons. But P.Ws 1 and 2 who are respectively the Excise Inspector and Excise Preventive Officer who accompanied C.W.1 in the very same Jeep

where examined. Both of them have given evidence in support of the prosecution case. In the face of the credible evidence of P.Ws 1 and 2 the hostility shown by P.W.5 the independent witness is of no consequence. Courts are not unfamiliar with such witnesses. ***Vide Sivaraman v. State of Kerala - 1981 KLT SN. 9.***

11. Merely because the scene of detection is 20 metres away from the property of one Elsy it does not follow that it was Elsy who was proving alcohol. She might have been an accused in an abkari offence. But that does not mean that the case of the prosecution that the accused was carrying 35 litres of wash on 31-7-2003 is false. Going by the credible testimony of P.Ws 1 and 2, when the excise patrol party reached about 20 metres away from the house of Elsy they came across the accused carrying a black jerry can having a capacity of 25 litres and a blue jerry can having a capacity of 10 litres. Seeing the excise party, the accused became perplexed. He was restraint and the jerry cans found in his possession were opened to find that it contained wash. This was detected by abkari officials through smell and taste. C.W.1 drew 500 ml. of sample in a bottle having a capacity of 750 ml. After drawing sample he sealed the bottle

and seized the same. The remaining quantity of wash was destroyed at the spot itself. Thereafter C.W.1 seized the two jerry cans and the sample bottle under Ext.P2 seizure mahazar. The accused, the seizure documents and the properties were then taken to the excise office from where P.W.3 the Assistant Excise Inspector registered Ext.P3 crime and occurrence report. On the next day itself he produced the properties as per Ext.P4 property list. He also filed Ext.P5 forwarding note requesting the despatch of the sample bottle to the chemical examiner for analysis. Ext.P4 property list shows that the properties namely jerry cans and the sealed sample bottle were received before the J.F.C.M., Sulthan Bathery on the next day itself namely, 1-8-2003. Ext.P7 is the report of chemical analysis dated 6-7-2001. It shows that the sample bottle containing 500 ml. of sample was forwarded to the chemical examiner's laboratory with its seals intact as per a covering letter dated 1-8-2003 of J.F.C.M. -I., Sulthan Bathery. Ext.P7 report further shows that the sample after chemical analysis was found to contain 6.30 percent by volume of Ethyl Alcohol. Thus the sample which was taken by C.W.1 from the spot itself seized after sealing the same and which was produced post-haste to the committal court and received there as P.R.

249/03 was despatched from the court on the same day to the chemical examiner's laboratory. From this, there cannot be any doubt that the two cans carried by the accused containing 35 litres of liquid was wash as known to the abkari law. In Parveen v. State of Kerala - 2007 (1) KLT 396 this court had the occasion what is "wash" under the Abkari Act. The liquid seized in this case squarely answers the description of wash as judicially noted. The conviction recorded by the court below under Sec. (g) of the Abkari Act does not therefore, call for any interference.

12. What remains to be considered is to the legality and extent of the sentence imposed on the appellant. The appellant was aged 52 years of age on the date of detection is a coolie by occupation.

13. Having regard to the totality of the circumstances, I do not think that the appellant does not deserve imprisonment for three years for the conviction. I am of the view that interest of justice will be adequately met by awarding him imprisonment for two years. Accordingly the sentence imposed on the appellant is reduced to simple imprisonment for two years. I am not interfering with the imposition of fine which is the minimum mandatory fine prescribed by the statute. However, the default

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sentence shall be three months instead of six months.

In the result, this appeal is disposed of confirming the conviction recorded against the appellant but modifying the sentence by reducing the same simple imprisonment for two years and reducing the default sentence six months from three months. In all other respects, the sentence imposed by the court below will stand confirmed.

V. RAMKUMAR
(JUDGE)

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V. RAMKUMAR, J.

Crl. Appeal No. 1921 of 2006 A

Dated: 12-03-2007

JUDGMENT